

OPINION AND ORDER

This proceeding is before us on a petition for review of an initial decision sustaining a 40-day suspension imposed under 5 U.S.C. § 7513(b). Appellant, a border patrol agent of the Immigration and Naturalization Service of the Department of Justice, was suspended for 40 days on three charges set forth in a letter of proposed action. The first charge was misconduct while off duty. The specifications were, in summary, that on September 24, 1978, while off duty, appellant remained on the privately-owned Telles Ranch after being told to leave by two ranch employees and a county deputy sheriff. The second charge, conduct prejudicial to the best interests of the service, was supported by specifications that (a) appellant was arrested by the deputy sheriff for trespassing and disorderly conduct on September 24, 1978, after refusing to comply with three requests to leave, and after inviting the deputy sheriff to arrest him; (b) appellant engaged in uncooperative conduct, set out in detail in the proposed letter, while he was at the sheriff's office on September 24; (c) appellant entered a no contest plea on December 29, 1978, to the charges of trespassing and disorderly conduct, with the plea deferred for six months and the charges to be dismissed if no similar charges or incidents occurred during that time; (d) a confrontation, set out in detail in the proposal letter, occurred on November 3, 1978, between the appellant and another deputy sheriff after hours at a bar. The third charge, insubordination, was based on the specifications, set out in detail in the proposal letter, that upon being advised that he would have to go on a detail, appellant told his supervisor that he would not go; that in his response to the supervisor, quoted in the proposal letter, appellant used a four-letter word twice as an adjective and once as a noun. His actions were described in the letter as clearly reflecting "disrespectful conduct, use of insulting, abusive, and obscene language to [his supervisor]."

Appellant timely appealed the suspension and requested a hearing. In his appeal, appellant, insofar as is pertinent here, denied the specifications underlying the first charge; denied the specifications underlying the second charge, except with respect to the no contest plea; and contended that the allegations in the third charge were "overstated." It is thus clear that appellant's appeal was based on serious disputes of material facts. Resolution of those facts was essential to a disposition of his appeal.

At the hearing, the agency called two witnesses. Both testified as to the first and second charges based on their reading of the investigatory record. Neither witness had been present at any of the incidents referred to, nor had they talked to anyone who had been present. One witness, the second-line supervisor, also testified as to the third charge on the basis of a conversation he had had with the first-line supervisor, who reported appellant's conduct and language to him, and on the basis of which the second-line supervisor had prepared a memorandum in the investigatory record. Appellant repeatedly objected to the testimony by these witnesses as hearsay because he was unable to cross-examine them on the substance of the information in the investigatory report. He was consistently overruled.

The presiding official found that all three charges and the specifications under each had been proved by a preponderance of the evidence; and that, therefore, the agency action promoted the efficiency of the service. He affirmed the agency action. His initial decision relied solely on evidence included in the agency's investigatory file and did not mention the testimony of the agency witnesses.

In his initial decision, the presiding official first addressed the question of the agency's failure to produce any witnesses for cross-examination on the disputed material facts. He concluded that appellant had not been denied due process. The presiding official concluded that the agency had no mandate under 5 U.S.C. § 7701 or 5 C.F.R. § 1201.24(c) to produce any witnesses at the hearing. He further concluded that appellant could have subpoenaed as witnesses the persons knowledgeable about the incidents on which the specifications were based and that appellant's election not to do so defeated his claim of denial of due process.

In resolving the disputed facts under the first two charges, the presiding official relied entirely on statements made during the investigation by the ranch manager, his son (the ranch foreman), the arresting deputy sheriff, two other deputy sheriffs, a guard on the ranch, and a jailer. None of the statements was signed. Each statement contained a preface that it was given freely and voluntarily, that the declarant was under oath, and that the declarant was willing to sign a transcript of the tape, providing it was a true and correct copy. Neither the declarant, nor the transcriber, nor the investigator who conducted the interviews testified at the hearing.

Appellant, who did testify, and three witnesses called by him, whose statements were also included in the investigatory file, disputed materially the hearsay testimony and the other statements with respect to what had transpired at the ranch, the jail, and the bar.¹ Moreover, it was demonstrated at the hearing that two sentences had been omitted

¹Appellant did not dispute the substance of the court record that was included in the investigatory file.

from the statement of one witness. The omitted sentences tended to exculpate appellant.²

The initial decision states that appellant challenged the use of the statements of the other declarants because he could not verify their accuracy, and he argued to the presiding official that the statements had little probative value because they were unsigned. The presiding official found that any omission in the prior statements of appellant's witness had been cured by his testimony and found that the statements of the witnesses generally conformed to their testimony, and, thus, the lack of signature on the witnesses' prior statements did not reduce their probative value. He made no similar findings with respect to the other statements and could make none because the other declarants did not testify, and the agency's witnesses had no knowledge other than what they had read in the investigatory file.

The presiding official accepted as accurate and credible almost all the information in the unsigned statements of the other declarants as to what transpired at the ranch and the jail.³ The presiding official balanced the live testimony of appellant and his three witnesses, all subjected to cross-examination, against the unsigned statements that formed the basis of the agency's case as to events at the ranch and the jail. The presiding official proceeded to discount⁴ the live testimony of appellant and his witnesses because there was "evidence that alcohol was involved." This evidence was recited from the unsigned statements⁵ and was contradicted by live testimony. The presiding official's determination of credibility was thus not based on inherent unbelievability of the substance of the live testimony, or inconsistencies in that testimony, or the demeanor of the witnesses, or any other factors that would support a reduction in the credibility of the live testimony. The presiding official did not state why unsigned statements without more had suffi-

²Two witnesses had tape recorded their own interviews. In addition to the omission of the exculpatory sentences, it was revealed at the hearing that the copy of the transcript of the interview furnished appellant's counsel and a witness was missing two pages.

³He specifically left unresolved the disputed question of whether appellant and his group had permission to be on the ranch prior to ranch personnel's asking them to leave as unnecessary to a resolution of the trespassing charge.

⁴The presiding official considered the live testimony to be of "a lesser degree" of credibility than that of the ranch personnel and law enforcement officials.

⁵On the question of drinking, the presiding official also relied on an entry in the sheriff's office report. But because a plea of no contest was accepted on the trespassing and disorderly conduct charges, there has never been proof of the allegations of drinking mentioned in the sheriff's report. The no contest plea entered by the employee on the trespassing and disorderly conduct charges does not bind him in this case. The plea is an implied admission of the offense for the purpose of that proceeding only. *North Carolina v. Alford*, 400 U.S. 25, 35 (1970); *Lott v. United States*, 367 U.S. 421, 426-27 (1961); *Duffy v. Cuyler*, 581 F. 2d 1059, 1062 (3rd Cir. 1978). The presiding official does not state why he accepted the unsigned statement about the incident at the bar over appellant's contradictory testimony.

cient weight to constitute probative evidence that would support the agency's burden of proof.

In his petition for review, appellant contends that the agency's evidence was totally hearsay, lacking in probative value, and insufficient to meet the preponderance of the evidence test and that to affirm the initial decision would constitute a denial of due process. The agency's cryptic response to these arguments is that "the record speaks for itself."

It bears emphasizing that on an appeal from an adverse action under 5 U.S.C. § 7513(b), the agency has the burden of proof and must sustain the burden of proof by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B). Contrary to the initial decision, we think it is irrelevant in this case whether appellant could have called the declarants as witnesses. The only question before us is whether the agency has sustained its burden of proof by a preponderance of the evidence it produced in this case.

We note that the agency's hearsay evidence was properly admitted at the hearing under well settled law that relevant hearsay evidence is admissible in administrative proceedings.⁶ We are also fully aware that hearsay evidence has been held to constitute substantial evidence in some circumstances.⁷ We conclude nevertheless that the agency's hearsay evidence is insufficient in the circumstances of this case to sustain the agency's burden of proof by a preponderance of the evidence.

*Richardson v. Perales*⁸ is the landmark case recognizing that hearsay may constitute substantial evidence. In that case, the Supreme Court held that hearsay evidence alone was sufficient to defeat a claimant's appeal from a denial of social security disability benefits by the Secretary of Health, Education and Welfare, despite contradictory live testimony of claimant and his personal physician. The hearsay evidence, consisting of five medical reports by physicians who had examined the claimant, was considered substantial evidence. The Court, first, however, expressed its confidence in the underlying reliability and probative value of the medical reports. The Court then concluded that the integrity of the administrative process was not damaged by reliance on the medical reports to refute the contradictory live testimony. Thus, *Perales*, while holding that hearsay alone may constitute substantial evidence, has not, we think, changed the traditional test used both before and after that decision, that the assessment of the probative value of hearsay evidence

⁶*Opp Cotton Mills v. Administrator of Wage & Hour Division of Dept. of Labor*, 312 U.S. 126 (1941); *Willapoint Oysters v. Ewing*, 174 F.2d 676 (9th Cir. 1949), cert. denied, 338 U.S. 860, rehearing denied, 339 U.S. 945 (1950).

⁷E.g., *Richardson v. Perales*, 402 U.S. 389 (1971); *School Board of Broward County v. Dept. of HEW*, 525 F.2d 900 (5th Cir. 1976); *Peters v. United States*, 408 F.2d 719 (Ct. Cl. 1969).

⁸402 U.S. 389 (1971).

necessarily rests on the circumstances of each case.⁹ Rather, *Perales* has been perceived as a rejection of any rule that hearsay may not *per se* constitute substantial evidence.¹⁰ We adopt that interpretation of *Perales*.

It still remains for the trier of fact to weigh the probative value of the hearsay evidence in the circumstances of the case. In *Perales*, the Court noted that the medical reports had been prepared routinely by unbiased physicians who had examined the claimant, that such reports were regularly used in the agency's adjudication of hundreds of thousands of disability claims, and that courts had recognized their reliability even in formal trials and had admitted them as an exception to the hearsay rule.¹¹ In other cases where hearsay alone has been held sufficient to sustain an agency action, other factors entered into the court's determination of the reliability and trustworthiness and hence probative value of the hearsay evidence. For example, in *Peters v. United States*,¹² an agency action was sustained both on the testimony of persons who had spoken to the absent declarants of signed sworn statements and on the signed sworn statements. The court relied heavily on the fact that the witness who testified had spoken to the affiants, and it was possible to test the credibility of the witness testifying as to the hearsay, the accuracy of his recollection of the hearsay statement, and his ability and opportunity to observe the affiant and hear what was said of the hearsay. The court also noted the lack of subpoena power that disabled the agency from calling the affiants.

In *School Board of Broward County, Florida v. Dept. of HEW*,¹³ the court found substantial hearsay relied on to support an administrative finding denying eligibility for federal aid. Following the example of *Perales*, the court looked for assurance of underlying reliability and probative value to determine whether the hearsay evidence constituted substantial evidence. The court stated that two impartial witnesses testified as to statements made to them, that direct evidence was unavailable, that there was no subpoena power for the agency to call

⁹E.g., the following cases accepted or rejected hearsay evidence as probative depending on the circumstances of the case: *Willapoint Oysters v. Ewing*, 174 F.2d 676 (9th Cir. 1949), cert. denied, 338 U.S. 860, rehearing denied, 339 U.S. 945 (1950); *Peters v. United States*, 408 F.2d 719 (Ct. Cl. 1969) (accepting); *Kowal v. United States*, 412 F.2d 867 (Ct. Cl. 1969) (rejecting); *Jacobowitz v. United States*, 424 F.2d 555 (Ct. Cl. 1970) (rejecting); *Reil v. United States*, 456 F.2d 777 (Ct. Cl. 1972) (rejecting); *Browne v. Richardson*, 468 F.2d 1003 (1st Cir. 1972) (rejecting); *Martin v. Secretary of Dept. of HEW*, 492 F.2d 905 (4th Cir. 1974) (rejecting); *McKee v. United States*, 500 F.2d 525 (Ct. Cl. 1974) (rejecting); *School Board of Broward County, Fla. v. Dept. of HEW*, 525 F.2d 900 (5th Cir. 1976) (accepting).

¹⁰See *School Board of Broward County, Fla.*

¹¹402 U.S. at 403-5.

¹²408 F.2d 719.

¹³525 F.2d 900 (5th Cir. 1976). See also *Winfield v. Mathews*, 571 F.2d 164 (3rd Cir. 1978), cert. denied, 439 U.S. 869 (1968).

witnesses to give direct testimony, and, thus, the case rested on the only available evidence, which was uncontradicted by the School Board.

More recently in *Schaefer v. United States*,¹⁴ the U.S. Court of Claims affirmed an agency's removal action and held that statements regarding plaintiff's misconduct, signed by three of his co-workers, were of sufficient probative force to constitute substantial evidence. The court found sufficient assurance of the truthfulness of this hearsay evidence, relying on the fact that the individuals signed their respective statements and another person witnessed their doing so and also signed the statement. While noting that in appropriate cases uncorroborated hearsay could constitute substantial evidence, the court pointed out that the statements in this case all contained corroboration in the administrative record.

In other cases decided since *Perales*, courts have not hesitated to dismiss hearsay evidence as insubstantial under the circumstances of the case. In *Reil v. United States*,¹⁵ the court found it could not rationally choose to believe statements that lacked authentication, that conflicted with other statements made by a declarant who was not impartial, and that were denied by live testimony.

In *McKee v. United States*,¹⁶ the court found the hearsay evidence lacking in sufficient assurance of its truthfulness to overcome sworn live testimony of a claimant where the hearsay evidence (captions on pictures) was unsworn and its authorship was unknown. The court observed, however, that had the hearsay evidence been the best available and had the government asked the Board to accept it, "the situation could have been entirely different."¹⁷

In *Browne v. Richardson*,¹⁸ the court refused to give substantial weight to a medical report prepared by a physician who neither examined the claimant of disability benefits nor testified at the hearing. In *Martin v. Secretary of HEW*,¹⁹ the court similarly refused to consider a report prepared by a physician who had not examined the claimant as substantial evidence. The court held that "an examination of a claimant adds such significant weight to a medical opinion as to the presence or absence of disability that, without it, the opinion, standing alone, cannot constitute substantial evidence to support a conclusion which relies solely on it"²⁰

¹⁴Ct. Cl. Docket No. 525-78 (July 16, 1980).

¹⁵456 F.2d 777 (Ct. Cl. 1972).

¹⁶500 F.2d 525 (Ct. Cl. 1974).

¹⁷*Id.* at 528.

¹⁸468 F.2d 1003 (1st Cir. 1972).

¹⁹492 F.2d 905 (4th Cir. 1974).

²⁰492 F.2d 907-8. Furthermore, in *Silver v. California Unemployment Insurance Appeals Board*, 129 Cal. Rptr. 411 (1976), the California Court of Appeals held that although uncorroborated hearsay can be received and considered in an administrative hearing, when contradicted, it is not sufficient in itself to provide a basis for denying unemployment insurance benefits.

In *Henley v. United States*,²¹ the court also concluded that the agency's evidence, which was quite similar to the evidence presented in the instant case, was devoid of substantiality. In that case, the agency presented two live witnesses, who were agency employees but who had no direct personal knowledge of the charges against the plaintiff, as well as documentary evidence consisting of mostly unsworn and unsigned statements. The court noted that the entirety of the evidence presented against the plaintiff was non-expert testimony in a situation where the credibility of witnesses was crucial.²² In criticizing the evidence, the court stated that not only was the evidence primarily unsworn hearsay, but it could not depend on any of the factors that ordinarily redeem hearsay. The court explained: "the already undesirable nature of hearsay was compounded by the inability of the witnesses to verify anything about credibility."²³

In *Cooper v. United States*,²⁴ the Court of Claims recently found that the decision to terminate an employee on the basis of alleged acts of sexual misconduct was not supported by substantial evidence where the removal was based upon information contained in four paragraphs of an investigatory report. The contents of the report consisted of data excerpted from state arrest records, a police officer's report of interviews with witnesses, and an interview with an investigator. The court, noting that the agency's investigator failed to take the stand at plaintiff's hearing, concluded that this type of evidence was "attenuated and highly unreliable," and at best was "triple hearsay."²⁵ Although plaintiff never denied the charges against him, and neither testified on his own behalf nor produced any witnesses attesting to his innocence at the hearing, the court believed the inferences from such inaction were insufficient to overcome the lack of evidence supporting plaintiff's removal.

In sum, the judicial precedents examining the weight to be given hearsay evidence, particularly documentary evidence such as an administrative record, included the following factors in considering the probative value of the hearsay evidence:

- (1) the availability of persons with firsthand knowledge to testify at the hearing;
- (2) whether the statements of the out-of-court declarants were signed or in affidavit form, and whether anyone witnessed the signing;
- (3) the agency's explanation for failing to obtain signed or sworn statements;
- (4) whether declarants were disinterested witnesses to the events, and whether the statements were routinely made;

²¹379 F. Supp. 1044, 1054 (M.D. Pa. 1974).

²²*Id.* at 1052.

²³*Id.* at 1053.

²⁴Ct. Cl. No. 493-79C (Dec. 17, 1980).

²⁵Slip Opinion at p. 4.

- (5) consistency of declarants' accounts with other information in the case, internal consistency, and their consistency with each other;
- (6) whether corroboration for statements can otherwise be found in the agency record;
- (7) the absence of contradictory evidence;
- (8) credibility of declarant when he made the statement attributed to him.

At the same time, judicial precedent has held no more than that hearsay evidence may be "substantial" evidence to support an administrative determination upon judicial review. As emphasized earlier, we are bound by the statutory standard that precludes our sustaining an agency adverse action under Chapter 75 unless the agency's action is supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(2)(B).

Hearsay evidence that meets the "substantial" standard may not have sufficient probative value or weight to meet the preponderance standard. These standards have been distinguished and set forth by the Board in *Parker v. Defense Logistics Agency*,²⁶ for the benefit of presiding officials. The substantial evidence standard requires evidence only of such quality and weight that reasonable and fair minded persons in exercising impartial judgment might reach different conclusions, while the preponderance standard requires evidence that a reasonable person would accept as sufficient to find a contested fact more probably true than untrue.

It must therefore be determined whether the agency's evidence in this case has sufficient reliability in the face of contradictory sworn live testimony to meet the preponderance standard. That determination must be made on the basis of the entire record before the Board.²⁷

By not relying on the testimony of the agency's witnesses to support any of his findings of fact, the presiding officer presumably did not accord the testimony any probative value. If that was his intention, then he was correct. The agency witnesses' testimony on the first and second charges was wholly without probative value. The declarants had never made any statements on the subject in the presence of the witnesses. The witnesses were therefore unable to verify the accuracy of the transcriptions or recount what they heard and saw or in any way assess the probativeness of the statements when they were being made. The Board's judgment in this case is consistent with the judgments in *Browne* and *Martin*, in which the court refused to accept as substantial evidence reports of physicians who had not examined the claimant.

But in ignoring the agency's testimony and relying on the investigatory record, the presiding official did not avoid the problem of hearsay. The presiding official has in effect, subsequent to the hearing, treated

²⁶1 MSPB 489, 508-509 (1980).

²⁷*Id.*, 508.

the agency's case as if it had simply offered the investigatory record at the hearing without introducing witnesses.

The statements that form the basis for the presiding official's findings of fact are hearsay, nevertheless, and the circumstances in which they are relied on dictate what weight they should have in this case.²⁸ Before accepting the statements as sufficient to sustain the agency's action, a reasoned judgment must be made as to their probative value, using the factors outlined above. The presiding official failed to make that judgment. We do so now.

The case is before us in this posture: In the face of contradictory live testimony at the hearing, the presiding official has accepted the agency's unsigned hearsay statements, without more, as dispositive of disputed facts that the agency must prove. The agency has offered no explanation as to why it did not obtain the declarants' signatures on their statements and/or have someone witness the statements; neither has the agency explained why it failed to present any witnesses with firsthand knowledge at the hearing. These statements are patently not like medical reports. Although the statements were consistent with each other, the declarants were actors to a greater or lesser degree in the incidents at issue and cannot be considered disinterested; the statements were not routinely made; nor have statements of this kind traditionally enjoyed judicial acceptance at hearings.

Moreover, here the evidence must be sufficient to sustain the burden of proof, not merely meet a claimant's evidence. The statements are fundamentally of a kind that cannot, without more, be accorded even the weight of substantial evidence. In addition, by being unsigned, not even the declarants have signified the accuracy of the transcriptions or the truth of the statements. Furthermore, the fact that two sentences tending to exculpate appellant were omitted from the transcripts diminishes the probative value of these statements. While appellant apparently had the opportunity to review the statements prior to the hearing and to subpoena the declarants to appear at the hearing, the burden is not upon appellant to call witnesses that the agency needs to prove its case.

We are therefore not prepared to find on this record that the agency's evidence is sufficient to establish that the contested facts are more probably true than untrue. We agree with the court's criticism in *Henley* of an agency's reliance on evidence merely consisting of two live wit-

²⁸ See *Kowal v. United States*, 188 Ct. Cl. 631, 638 (1969), where the court stated that in reviewing an administrative decision, it must concern itself "not only with the mere existence of some evidence at some point in the record, but with the sort and type of that evidence, its credibility and trustworthiness, its relationship to the other evidence, and the amount, type, and credibility of the other evidence."

The court, recognizing the inherent superiority of testimony subject to cross-examination, concluded that the Civil Service Commission could not rationally choose to believe affidavits over oral testimony, unless the latter was inherently incredible.

nesses without firsthand knowledge of the charges against plaintiff and unsworn and unsigned statements. It serves no purpose to speculate what other evidence might have satisfied the agency's burden in this case. It should be apparent, however, that direct testimony by the declarants, if available, would have avoided the pitfalls of reliance on hearsay evidence.²⁹

On the basis of the whole record, including appellant's and his witnesses' sworn, contradictory testimony, the agency's unsigned statements do not rise to a probative value sufficient to resolve the factual disputes favorably to the agency. We hold that the agency has failed to sustain its burden of proof on the first two charges by a preponderance of the evidence.

On the third charge, insubordination, appellant did not materially dispute what happened as set out in the memorandum in the investigatory report. In his appeal he challenged the charge on the ground that it was "overstated." His testimony and that of his witnesses showed that despite his opposition to the detail, he did go; that the language he used was common among the male employees where he was stationed; that the supervisor to whom he had used the language also used obscene or profane language as much as anyone else. The evidence introduced by appellant on this charge was thus mitigating of any effects his conduct and speech might have had. The initial decision held, nevertheless, that even if commonly used at appellant's duty station, four-letter words were not an acceptable form of verbal communication by an employee, even in anger, to his supervisor and concluded that the charge of insubordination had been proven by a preponderance of the evidence.

Because the incident was not materially disputed and the presiding officer credited the substance of the live testimony, we do not have here the question of the probative value of hearsay testimony. Appellant's undisputed testimony was that his immediate supervisor did not react to appellant's language and did not warn appellant that he might be subject to discipline for using such language. The record shows that it was not the immediate supervisor who proposed discipline but rather the second line supervisor who testified at the hearing. There is no showing as to how the incident affected the efficiency of the service and under the circumstances we can discern none. Thus, the agency has failed to meet its burden of proof on the third charge.

²⁹ Whether testimony of the investigator or transcriber as to what they heard and saw when the statements were being made could have been sufficient with the statements to prove the agency's case is a question not before us here. We note, however, that the court in *Martin* suggested that had the physician who had not examined the claimant but whose report was the agency's only evidence been called as a witness, the agency's evidence might have had greater probative value. In that case, the physician would have been testifying as to his own report, based on the reports of examining physicians. The underlying reports of the examining physicians would presumably have had many of the earmarks of probativeness that are lacking in the statements here.

The petition for review is granted and the initial decision is reversed. This is a final decision of the Merit Systems Protection Board.

The agency is hereby ordered to cancel the appellant's 40-day suspension and to submit evidence of compliance with this decision to the appropriate field office within five days of issuance of this decision.

Appellant is hereby notified of his right to file a request for attorneys' fees³⁰ with the appropriate field office within ten (10) days of this decision and of his right to file a civil action in the United States Court of Appeals or in the U.S. Court of Claims within 30 days of receipt of this decision.

RUTH T. PROKOP.

ERSA H. POSTON.

RONALD P. WERTHEIM.

WASHINGTON, D.C., *February 27, 1981*

³⁰ Appellant prematurely requested attorneys' fees in his petition for review. Our regulations provide that "[r]equests for payment of attorney fees shall be made within 10 days of final date of a decision." See 5 C.F.R. § 1201.37(a)(2).